No. 15-274

In the Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,
Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER, TEXAS DEPARTMENT OF STATE HEALTH SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH, *ET AL.* AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI*[1]

Amici are the National Latina Institute for Reproductive Health ("NLIRH") and nine local and national Latino/a organizations. NLIRH advances health, dignity, and justice for the 26 million Latinas, their families, and communities in the United States, including the 2.5 million Latinas of reproductive age in Texas. As part of its work, NLIRH engages international human rights bodies and experts to further comprehensive healthcare access, including abortion, for Texas Latinas. All *amici* recognize that meaningful access to abortion services is a fundamental human right that is vital to the protection and development of Latino/a communities. In addition to NLIRH, *amici* are Alianza Americas, California Latinas for Reproductive Justice, Casa de Esperanza, Colorado Organization for Latina Opportunity and Reproductive Rights (COLOR), Hispanic Federation, Labor Council for Latin American Advancement, LatinoJustice PRLDEF, League of United Latin American Citizens, and the Mexican American Legal Defense and Educational Fund, Inc. (MALDEF). All *amici* have a significant interest in this case and write in support of petitioners.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission. By email, counsel for the parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case considers the constitutionality of two provisions of 2013 Texas House Bill No. 2[2] ("H.B. 2") that impose substantial obstacles in the path of women, including Latinas, seeking to terminate their pregnancies. The fundamental liberty right recognized in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) as central to women's personal dignity and autonomy cannot be meaningfully exercised in Texas because the challenged provisions of H.B. 2 hinder women's ability to obtain an abortion. Full implementation of H.B. 2 will cause 75% of Texas abortion clinics to close, leaving large swaths of the state without a legal abortion provider. *Amici* submit this brief to place the realities of the lives of 2.5 million Texas Latinas of reproductive age before the Court and to urge the Court to find the challenged provisions of H.B. 2 unconstitutional. Those provisions require that (1) a physician performing an abortion at a clinic have admitting privileges at a hospital within 30 miles of the clinic (the "AP requirement"); and (2) that abortion clinics meet the statutory standards for ambulatory surgical centers (the "ASC requirement"). TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a)(1), 245.010(a).

The AP requirement has closed nearly a third of Texas's abortion providers. (J.A. 228-231.) If the Fifth

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[2] Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1 §§ 1-12, 2013 Tex. Sess. Law Serv. 4795-802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031(a)(1), 171.041-.048, 171.061-.064, & amending 245.010-.011; amending TEX. OCC. CODE. ANN. §§ 164.052 & 164.055).

Circuit's decision is affirmed, more than half of the remaining clinics will close and the capacity of the clinics able to remain open to provide abortions will be sharply limited. (*See* Pet.'s Motion to Stay, at 12-13.) Those clinics will be clustered in the metropolitan areas of Dallas-Fort Worth, Austin, San Antonio, and Houston. There will be no provider west of San Antonio. If the McAllen clinic, operating in the Rio Grande Valley (the "Valley"), one of Texas' poorest regions, is able to stay open, it will be the only provider south of San Antonio and able to provide services only on a limited basis. (*Id.*)

Texas Latinas already face significant geographic, transportation, infrastructure, and cost challenges in accessing health services. Many are forced to forego medical care when they are ill because they cannot take time off from work or school, or secure childcare. Latinas living with domestic violence or concerned over the immigration status of themselves or family members face additional hurdles in accessing reproductive healthcare.

The District Court found that clinic closures caused by the challenged provisions "would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 682 (W.D. Tex. 2014) *aff'd in part, vacated in part, rev'd in part sub nom. Whole Woman's Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) *modified*, 790 F.3d 598 (5th Cir. 2015) and *cert. granted*, 136 S. Ct. 499 (2015). The court found that "increased travel distances" required to obtain abortion services in the wake of H.B. 2, where so many Texas women faced a "lack of availability of

child care, unreliability of transportation, unavailability of appointments [], unavailability of time off from work, immigration status and inability to pass border checkpoints, [and] poverty" operated as "a *de facto* barrier to obtaining an abortion for a large number of Texas women of reproductive age." *Id.* at 683. Given the undue burden the challenged provisions will have on Latinas and all women in Texas, this Court should reverse the Fifth Circuit's decision and affirm the District Court's decision.

Such a ruling is consistent with this Court's holding in *Casey* because the undue burden standard prohibits states from imposing requirements on access that effectively take away a woman's ability to exercise her right to terminate a pregnancy before viability *See Casey*, 505 U.S. at 894 (invalidating spousal notification requirement because it deterred women experiencing domestic violence "from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases"). *Casey*'s recognition that women must have a real, and not illusory, opportunity to exercise their constitutional rights has been consistently acknowledged by this Court and is supported by international courts and human rights bodies.

The reasoning of international bodies when considering whether a state can erect barriers to access lawful abortion services provides a useful perspective for the Court to consider. In particular, the European Court of Human Rights ("ECHR") has repeatedly held that once a country recognizes that women have a right to abortion, it cannot adopt a legal framework that limits a woman's ability to obtain one.

The findings of the international community and respected human rights bodies concerning the impact of restrictive abortion laws on women's health are also instructive. Around the world, it is well-documented that where women do not have access to legal abortions, there is an increased rate of illegal and unsafe abortions with attendant risks to life and health. Given the unprecedented reduction of legal abortion services that will result if H.B. 2's challenged provisions go into effect, the experiences of other countries with restrictive abortion laws help to "cast an empirical light on the consequences of different solutions to a common legal problem.'" *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

BACKGROUND

To understand the burden the challenged provisions place on women in Texas, particularly Latinas, one must first understand Texas. "Texas contains nearly 280,000 square miles, is ten percent larger than France, and is home to the second highest number of reproductive-age women in the United States. Such women account for approximately 5.4 million of over 25 million Texas residents." *Lakey*, 46 F. Supp. 3d at 681. A significant portion of the 5.4 million are Latina.[3] Although the Latino population is spread throughout Texas, El Paso and the Valley have the highest

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[3] Kyle Janek et al., *Presentation to Senate Committee on Health and Human Services: Texas Women's Health and Family Planning Programs* 4 (TEX. HEALTH & HUMAN SERVS. COMM'N & TEX. DEP'T OF STATE HEALTH SERVS., Feb. 20, 2014), http://www.hhsc.state.tx.us/news/presentations/2014/022014-womens-health.pdf.

concentration of Latinas.[4] Ninety percent of reproductive-age women living in the Valley are Latina. (J.A. 193.)

The District Court found that Texas Latinas, especially, but not exclusively, those in the Valley, face severe burdens in accessing reproductive healthcare because of the challenged provisions, observing that "women in the border communities of the Rio Grande Valley and El Paso will be affected most heavily" by H.B. 2's strictures due to longer travel distances (in some cases exceeding 500 miles), higher-than-average poverty levels, and other issues uniquely associated with minority and immigrant populations." *Lakey*, 46 F Supp. 3d at 683. The Circuit Court credited these findings, acknowledging "the difficulties that women in the Rio Grande Valley faced" counseled against fully upholding H.B. 2's restrictions as to the McAllen facility. *Whole Woman's Health v. Cole*, 790 F.3d 563, 593 (5th Cir.) *modified*, 790 F.3d 598 (5th Cir. 2015) and *cert. granted*, 136 S. Ct. 499 (2015). While neither court made explicit that its findings applied to Latinas, there is no question that they do: 81% of El Paso County's population is Latino[5], and in the four counties

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[4] *See* Pew Research Center, *Mapping the Latino Population, by State, County and City*, Appendix A1 (August 29, 2013), http://www.pewhispanic.org/2013/08/29/mapping-the-latino-population-by-state-county-and-city/ (Hispanic populations of the El Paso, McAllen-Edinburg-Pharr-Mission, and Brownsville-Harlingen-San Benito metropolitan areas are between 81 and 91 percent).

[5] *Census Quick Facts for El Paso Country, Texas*, U.S. CENSUS BUREAU http://quickfacts.census.gov/qfd/states/48/48141.html (last visited Dec. 30, 2015).

that comprise the majority of the Valley, the Latino population varies between 87% and 95%.[6]

A. Many Texas Latinas Face Significant Barriers to Accessing Health Services

Texas Latinas have built vibrant communities that have shown improvement in job growth and economic development since the recession of 2008-2009.[7] Despite these gains, H.B. 2's impact is acute because of the day-to-day struggles many Latinas encounter when seeking to exercise their reproductive rights. In Texas, there is a dire shortage of healthcare facilities and providers in predominantly Latino communities.[8] Texas has the highest percentage of uninsured adults in the country, and Texas Latinos are more than twice as likely as whites to be uninsured.[9]

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[6] *Census County Quick Facts for Cameron, Hidalgo, Starr, and Willacy Counties, Texas*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48/48061.html & 48215.html, 48427.html, 48489.html (collectively, hereinafter "Census Quick Facts").

[7] Federal Reserve Bank of Dallas, *The Economy of the Rio Grande Valley* 4-11 (Nov. 22, 2013), https://www.dallasfed.org/assets/documents/research/events/2013/13bedes_coronado.pdf.

[8] The U.S. Department of Health and Human Services designates El Paso County and all four counties in the Valley as either fully or partially "medically underserved." Find Shortage Areas: MUA/P by State and Country, U.S. DEP'T. OF HEALTH & HUMAN SERVS., http://muafind.hrsa.gov/index.aspx (last visited Dec. 30, 2015).

[9] State Health Facts, Uninsured Rates for the Nonelderly by Race/Ethnicity, KAISER FAMILY FOUNDATION (2014), http://kff.org/uninsured/state-indicator/rate-by-raceethnicity (last visited Dec. 18, 2015).

Additionally, the lack of public and private transportation creates a major barrier to accessing health services, especially in rural areas. (J.A. 364.) This is particularly true in the string of remote, unincorporated and largely immigrant communities known as *colonias* in border areas like the Valley and West Texas that often lack paved roads.

In East Texas, some cities and towns have public transit, but many people have either extremely limited access or no access to public transportation.[10] In the Valley, only Brownsville, McAllen and Harlingen have transit systems.[11] The intra-county bus system does not go to all counties, and buses do not run daily.[12] No public transportation connects the Valley to other Texas cities. (J.A. 364.) In West Texas, no public transit routes go beyond state borders.[13]

Many Latinas in the Valley do not own cars and cannot rely on personal transportation as an alternative. (J.A. 364-65.) Undocumented women are

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[10] *See generally* Official Travel Maps, TEXAS DEP'T TRANSP., http://www.txdot.gov/inside-txdot/forms-publications/maps.html (last visited Dec. 30, 2015).

[11] *Id.*

[12] Center for Reproductive Rights, Nuestro Voz, Nuestra Salud, Nuestro Texas: The Fight for Women's Reproductive Health in the Rio Grande Valley 31 (2015) (hereinafter "NT Report"), *available at* http://www.nuestrotexas.org/pdf/NT-spread.pdf.

[13] *See, e.g.*, Sun Metro Bus System Map, http://www.sunmetro.net/pdf/system_map.pdf#view=fitH (last visited Dec. 30, 2015).

unable to obtain drivers' licenses,[14] making it illegal for them to drive and difficult to register a car or obtain insurance. Women in the Valley who need to travel beyond walking distance typically rely on friends and neighbors who have cars and are willing and able to drive them. (J.A. 364-65.) In many cases, the price of gasoline for a long trip is prohibitive. *Id.* The farther a woman needs to travel, the higher the cost and the lower the availability of transportation. (J.A. 367-68.) As a result, it "is not uncommon for a woman to miss a medical appointment because of unreliable or unavailable transportation." (J.A. 365.)

Border patrol agents and internal immigration checkpoints on Texas roads further impede undocumented women and women with undocumented family members from traveling outside their communities, even if they need healthcare or other essential services.[15] With the cooperation of Texas law enforcement, Customs and Border Patrol ("CBP") currently operates checkpoints in South and West Texas that cut off El Paso County and the Valley from the rest of the state.[16]

Finally, because of high unemployment rates and poverty in Latina communities, women with jobs are

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[14] *See* NT Report, *supra* note 12, at 32.

[15] NT Report, *supra* note 12, at 33.

[16] *See* Manny Fernandez, *Checkpoints Isolate Many Immigrants in Texas' Rio Grande Valley*, N.Y. TIMES (Nov. 22, 2015), *available at* http://www.nytimes.com/2015/11/23/us/checkpoints-isolate-many-immigrants-in-texas-rio-grande-valley.html?_r=1 (describing how inability to travel hinders medical care).

reluctant to jeopardize them by asking for time off. (J.A. 366.) Many Texas Latinas live below the poverty line.[17] This includes 23% of El Paso County residents and between 34.8 and 40%[18] of residents in the Valley. The national poverty rate is 15.4%.[19]

Brownsville and McAllen have been named the two poorest cities in the United States.[20] Women in these areas will frequently forgo medical appointments – even when they are sick or require treatment – simply to keep their jobs. (J.A. 366.) Even if she can get time off from work, a woman with young children may be unable to afford or obtain the childcare she needs to travel. (J.A. 365-66.)

B. Women's Health Programs in Texas Have Been Chronically Underfunded

Two years before Texas enacted H.B.2, Texas gutted the programs on which many low-income Latina women had relied for access to contraception and other

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[17] In the 132 counties west or south of San Antonio, which contain 44.4% of Texas's Hispanic population, roughly 18.5% of the total population lives below the federal poverty line. (J.A. 191.)

[18] The poverty rates in Starr, Hidalgo, Willacy and Cameron Counties are 39.2%, 34.8%, 40.0% and 34.8%, respectively. *See* Census Quick Facts, *supra* note 6.

[19] *Id.*

[20] Craig Havarti, *Brownsville Named the Poorest City in America*, HOUSTON CHRONICLE (Oct. 31, 2013), *available at* http://www.chron.com/news/houston-texas/texas/article/Brownsville-named-the-poorest-city-in-America-4939821.php.

preventive reproductive healthcare,[21] cutting the funding for such programs by nearly two-thirds. These cuts profoundly reduced Latinas' access to reproductive health services.[22] As a result, these women now have few options for "control[ling] their reproductive lives" and are thus hampered in their ability "to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856.

For the year following the 2011 cuts, Texas met only 13% of the need for publicly funded contraception.[23] That same year, the Texas Health and Human Services Commission estimated that in 2014-15, women with low incomes would deliver 23,760 more babies due to

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[21] TEX. WOMEN'S HEALTHCARE COALITION, TEXAS WOMEN'S HEALTHCARE IN CRISIS 3-4 (Jan. 25, 2013), *available at* http://www.texaswhc.org/wp-content/uploads/2013/01/Texas-Womens-Healthcare-in-Crisis.pdf.

[22] The 82nd Legislature cut family-planning funding from $111 million to $37.9 million, and prohibited disbursement of those funds to family-planning clinics run by Planned Parenthood, previously the largest source of preventative reproductive health services in Texas. TEXAS POLICY EVALUATION PROJECT, RESEARCH BRIEF, 2011 TEXAS LEGISLATION LEAD TO FAMILY PLANNING CLINIC CLOSURES, REDUCED SERVICES, AND UNCERTAIN FUTURE (Apr. 6, 2015), *available at* http://www.utexas.edu/cola/txpep/releases/ajph2015-release.php.

[23] Jennifer Frost et al., *Contraceptive Needs and Services, 2012 Update*, GUTTMACHER INST 19-20 (August 2014), http://www.guttmacher.org/pubs/win/contraceptive-needs-2012.pdf (showing that Texas met only 13% of the demand compared to a national total of 31%).

reductions in state-subsidized birth control.[24] By 2013, 25% of family planning clinics in Texas closed, including nearly one-third of the clinics in the Valley. The remaining clinics served 54% fewer clients.[25] Clinics in the Valley were clustered in Harlingen and Brownsville and strained to meet the increased demand for services, leading to long wait times for women able to get appointments.[26]

C. H.B. 2's Challenged Provisions Take Matters from Bad to Worse

The Texas legislature's passage of H.B. 2 took conditions from bad to worse. Partial implementation of H.B. 2 has already created a shortage of abortion providers, increased delays, travel distances and expense, and resulted in a decline in the overall abortion rate and an increase in the proportion of second-trimester abortions. (J.A. 234-35, 237-38, 240, 248.) If the Fifth Circuit is affirmed, the number of abortion providers will further decrease. The lack of

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[24] Emily Ramshaw, *Likely Increase in Births Has Some Lawmakers Revisiting Cuts*, N.Y. TIMES (Dec. 7, 2012), *available at* http://www.nytimes.com/2012/12/07/us/likely-increase-in-births-has-some-lawmakers-revisiting-cuts.html?_r=0.

[25] Kari White et al., *The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas*, 105 AM. J. PUB. HEALTH 851, 855 (May 2015); UNIV. OF TEXAS POPULATION RESEARCH CTR., TXPEP Family Planning Data Finder by County: DSHS Family Planning Clinic Closures, http://www.prc.utexas.edu/txpep/#county/427, 215, 61, 489 (last visited Dec. 30, 2015) (showing that 9 out of 32 clinics in the four counties of the Valley closed from 2011-2012).

[26] *See* NT Report, *supra* note 12, at 19, 23.

providers in West Texas and the substantial decrease in capacity in South Texas and the Valley will make it even harder for women to access abortion services.

After H.B. 2's AP requirement caused more than half of Texas' abortion clinics to close, wait times for appointments at many of the remaining clinics significantly increased. As of September 2015, the two remaining clinics in Dallas reported wait times up to 20 days, clinics in Austin reported wait times over 20 days, and clinics in Fort Worth reported wait times of 23 days.[27] Assuming that the demand for abortion services remains constant, the forced closure of non-ASC clinics will further increase wait times.[28] This is not some mere inconvenience: a woman's ability to secure an abortion, a service for which the price increases with every passing week, depends on whether clinics legally providing the service have the ability to see her. Clinics running above capacity cannot, by definition, see all patients who need their services.

The denial of meaningful access to abortion can cause women to carry unintended pregnancies to term or lead women to attempt to terminate their pregnancies independently. Prior to H.B. 2's implementation, a survey of Texas women seeking abortion showed that Texans were much more likely

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[27] Texas Policy Evaluation Project, Research Brief, Abortion Wait Times in Texas: The Shrinking Capacity of Facilities and the Potential Impact of Closing Non-ASC Clinics 2 (2015) *available at* http://www.ibisreproductivehealth.org/publications/abortion-wait-times-texas-shrinking-capacity-facilities-and-potential-impact-closing (hereinafter "TxPep Abortion Wait Times").

[28] *Id.* at 6.

than women nationally to attempt self-induction.[29] Research indicates that self-induction is more common in Latina communities, particularly along the border.[30] After the first wave of clinic closures, the McAllen clinic encountered a significant increase in women seeking assistance after attempting self-induced abortions. (J.A. 721-22.)

The additional clinic closures and reduction of service that will result if the Fifth Circuit is affirmed will worsen an already dire situation. In addition to preventing or significantly burdening women's access to legal abortion, researchers suspect that clinic closures imposed by H.B. 2 will make self-induction more common as clinic-based care becomes more difficult to access,[31] threatening the health and well-being of women in the state.

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[29] Daniel Grossman et al., *The Public Health Threat of Anti-Abortion Legislation*, 89 CONTRACEPTION 73 (2014) (7% of Texas women seeking abortion surveyed reported attempted self-induction in their current pregnancy compared to 2.6% of abortion patients in a national survey who report *ever* attempting self-induction).

[30] Daniel Grossman et al., Texas Policy Evaluation Project, Research Brief, Knowledge, Opinion and Experience Related to Abortion Self-Induction in Texas 4 (Nov. 17, 2015), *available at* http://www.ibisreproductivehealth.org/publications/knowledge-opinion-and-experience-related-abortion-self-induction-texas (hereinafter "TxPep Self-Induction Report").

[31] TxPep Self-Induction Report, *supra* note 30, at 4.

D. Latina Human Rights Advocacy

Because of the pervasive lack of access to reproductive healthcare, Latinas in the Valley have engaged with state and local governments and human rights bodies to advocate for access to reproductive healthcare as a human right.[32] Consequently, United Nations ("U.N.") human rights treaty bodies have recognized that "racial disparities in the field of sexual and reproductive health" and immigrants' lack of "effective access to affordable and adequate health-care services" in the U.S. are areas of human rights concern.[33] Recently, a U.N. expert group visited the Valley and expressed concern that "immigrant women

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[32] Dominique Mosbergen, *Texas' Family Planning Cuts Are A Human Rights 'Disaster': Report*, HUFFINGTON POST, updated Feb. 27, 2014, http://www.huffingtonpost.com/2014/02/26/nuestro-texas-rio-grande-valley-report_n_4849754.html; Lucy Felix, *Why My Fight for Latina Health Took Me All the Way to the UN*, RH REALITY CHECK (March 31, 2014, 11:16 am), http://rhrealitycheck.org/article/2014/03/31/fight-latina-health-took-way-un/.

[33] U.N. Committee on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Periodic Reports of the United States of America*, ¶ 15, U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014); *see* U.N. Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of the United States of America*, ¶ 15, U.N. Doc. CCPR/C/US/CO/4 (April 23, 2014) (recommending that the U.S. "identify ways to facilitate access to reproductive health services, by undocumented immigrants and their families").

face severe barriers in accessing sexual and reproductive health services."[34]

ARGUMENT

I. COURTS THROUGHOUT THE WORLD RECOGNIZE THAT THE PRACTICAL IMPOSSIBILITY OF EXERCISING A FUNDAMENTAL RIGHT OPERATES AS A DEPRIVATION OF THAT RIGHT

The undue burden standard adopted in *Casey* protects against measures that prevent the practical exercise of a woman's right to choose to terminate her pregnancy prior to viability. *Casey,* 505 U.S. at 877 (prohibiting regulations that place a "substantial obstacle in the path of a woman's choice"). The principle that legislation that operates to prevent the practical exercise of a fundamental right constitutes an impermissible deprivation of that right has been consistently recognized by this Court and international courts and human rights bodies. *See, e.g. Harman v. Forssenius,* 380 U.S. 528, 540 (1965) ("Constitutional rights would be of little value if they could be . . indirectly denied or manipulated out of existence") (citations omitted); *see also PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 91 (1980) (Marshall, J., concurring) ("Rights of free expression become illusory when a State has operated in such a way as to shut off

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[34] U.N. Office of the High Commissioner on Human Rights, UN Working Group on the Issue of Discrimination Against Women in Law and in Practice Finalizes Country Mission to the United States (Dec. 11, 2015), http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16872&LangID=E (hereinafter "U.N. Working Group Statement").

effective channels of communication."); *Wegrzynowski and Smolczewski v. Poland*, no. 33846/07, ¶ 55, ECHR 2013, *available at* http://hudoc.echr.coe.int/eng?i=001-122365 (fundamental rights must be "practical and effective" and not "theoretical or illusory"); *Tysiac v. Poland*, 2007-I Eur. Ct. H.R. 219, 248; *P and S v. Poland*, no. 57375/08, ¶ 99, ECHR 2012, *available at* http://hudoc.echr.coe.int/eng?i=001-114098.

With respect to abortion rights, the ECHR has emphasized that where a country recognizes that a woman has a right to an abortion, it must ensure that the right can be meaningfully exercised. *R.R. v. Poland*, 2011-III Eur. Ct. H.R. 209, 251-52 (where a state "adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain [an abortion]"); *see A, B and C v. Ireland* [GC], 2010-VI Eur. Ct. H.R. 185, 269 (criticizing "striking discordance between the theoretical right to a lawful abortion in Ireland" and "the reality of its practical implementation"). The U.N. Human Rights Committee also has repeatedly criticized countries that have created obstacles to prevent women from obtaining an abortion in circumstances where they have a legal right to terminate their pregnancy.[35]

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[35] U.N. Human Rights Committee ("HRC"), *K.L. v. Peru*, Communication No. 1153/2003, ¶ 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005); HRC, *L.M.R. v. Argentina*, Communication No. 1608/2007, ¶¶ 9.3, 9.4, U.N. Doc. CCPR/C/101/D/1608/2007 (April 28, 2011); HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the*

Consistent with *Casey's* recognition that "unnecessary health regulations" that prevent women's access to abortion are impermissible, *Casey*, 505 U.S. at 878, respected international bodies and experts also have criticized the imposition of unnecessary restrictions on legal abortion providers that undermine access by creating delays and increasing costs.[36]

Covenant, ¶ 8, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004) (criticizing the unavailability of abortion in practice where the law permits it).

[36] *See* WORLD HEALTH ORGANIZATION ("WHO"), Department of Reproductive Health and Research, Safe Abortion: Technical and Policy Guidance for Health Systems 96 (2nd ed. 2012) (hereinafter "WHO Safe Abortion") ("Restrictions on the range of [legal abortion providers] reduce the availability of services and their equitable geographic distribution, requiring women to travel greater distances for care, thereby raising costs and delaying access."); Resolution on Access to Safe and Legal Abortion in Europe, Eur. Parl. Doc. (1607) ¶ 3 (2008) (hereinafter "European Parliament Resolution") (noting that abortion restrictions can make abortion access "more difficult, or even impossible in practice"); U.N. Working Group Statement, *supra* note 34 (criticizing the imposition of "severe barriers" to women's reproductive health services including the imposition of "burdensome conditions for the licensing of clinics"). The WHO also states that regulations on abortion providers should be evidence based and the same as other medical procedures and should not create access barriers. WHO Safe Abortion, *supra* note 36, at 65, 67.

II. H.B. 2'S CHALLENGED PROVISIONS IMPOSE AN UNDUE BURDEN ON LATINAS WHO ALREADY FACE SIGNIFICANT BARRIERS IN ACCESSING CARE

H.B. 2's challenged requirements place an undue burden on Latinas' right to choose whether to continue or end a pregnancy by creating a substantial obstacle to abortion access. The District Court correctly observed that a "woman with means, the freedom and ability to travel, and the desire to obtain an abortion, will always be able to obtain one, in Texas or elsewhere. However, *Roe*'s essential holding guarantees to all women, not just those of means, the right to a previability abortion." *Lakey*, 46 F Supp. 3d at 683. Many Texas Latinas are without means or the ability to travel. Given the circumstances in which Latinas live, if the Fifth Circuit decision is affirmed, the resulting closure of half of the remaining providers and severe restrictions on access in the Valley will cause Latinas to face substantial, and for many insurmountable, obstacles to abortion access.

To evaluate whether a burden is undue, courts must consider the real-life consequences of a challenged law. *See Casey*, 505 U.S. at 887-95 (considering the "unfortunate yet persisting conditions" experienced by women in abusive relationships); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (reviewing "the entire record and factual context in which the law operates"); *Planned Parenthood Southeast., Inc. v. Strange*, 9 F. Supp. 3d 1272, 1285 (M.D. Ala. 2014) ("Context matters" and requires "a careful, fact-specific analysis of how the restrictions

would impede women's ability to have an abortion, in light of the circumstances of their lives."). This includes evaluation of not only the circumstances *caused* by the regulation, but also "the interaction of the regulation with other challenges in women's lives." *Id.* at 1285; *see also Planned Parenthood Arizona, Inc. v. Humble*, 753 F.3d 905, 915 (9th Cir. 2014) *cert. denied*, 135 S. Ct. 870 (2014) (considering "the ways in which an abortion regulation interacts with women's lived experience").

Here, the District Court considered "the practical impact on Texas women" and found that clinic closures caused by H.B. 2 "would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." *Lakey*, 46 F. Supp. 3d at 682. The court further found that "increased travel distances" combined with "lack of availability of child care, unreliability of transportation, unavailability of appointments [], unavailability of time off from work, immigration status and inability to pass border checkpoints, [and] poverty level" established "a *de facto* barrier to obtaining an abortion for a large number of Texas women of reproductive age." *Id.* at 683.

As discussed below, each of the factors identified by the District Court, individually and collectively, demonstrate the impermissible obstacles that H.B. 2 will impose on Texas Latinas.

A. H.B. 2's Challenged Provisions Create a Substantial Obstacle by Increasing Travel Distances

If more Texas abortion clinics close, the increased distances women – especially residents of the Valley

and El Paso[37] – must travel to access abortion services in Texas shift from a complicating factor to a dispositive factor. This Court has long considered the distance a woman might be forced to travel to obtain an abortion in its undue burden analysis and has recognized that distance is not solely a question of miles, but rather whether the distance obstructs women from exercising their rights. *Hodgson v. Minnesota*, 497 U.S. 417, 476 (1990) (considering that travel burdens, are "particularly heavy for poor women from rural areas"). For Latinas, the conditions of travel greatly increase the burden. Many *colonias* lack paved roads or other basic infrastructure, and are not on bus routes. Many women living in the Valley do not have access to a car, and those that do must account for the cost of gas for long-distance travel. (J.A. 364-65)

The AP requirement greatly increased the distances Texas women must travel to obtain an abortion, and if the Fifth Circuit's decision is affirmed, that distance will increase even further. *Lakey*, 46 F. Supp.3d at 681. Over half of Texas' remaining clinics will close, and El Paso will not have an abortion provider. The Fifth Circuit's limited relief is likely insufficient to permit the McAllen clinic to continue providing abortions. It also prohibits the clinic from seeing women from areas immediately adjacent to the Valley, *Cole*, 790 F.3d at 596, such as Zapata, a small border

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[37] The Fifth Circuit has suggested that women living in El Paso can avoid traveling 550 miles to obtain an abortion in Texas by leaving the state and traveling to New Mexico. *Cole*, 790 F. 3d at 597-98. However, as the Fifth Circuit recognized in a prior case, a state cannot "lean on its sovereign neighbors" to ensure access to a constitutional right. *Currier*, 760 F 3d at 457.

town just outside of the Valley. Because of this limitation, a woman living in Zapata without a car would have to pay for and make the following arrangements to go to San Antonio over 200 miles away: (1) transportation to the bus station, (2) a one-hour bus ride to Laredo (there is only one bus per day),[38] (3) a three-hour bus ride to San Antonio,[39] (4) transportation from the bus station to a clinic, (5) overnight accommodations (because the limited bus schedule would likely require it), and (6) the same travel in reverse.

The Fifth Circuit decision would also require many Valley residents to travel approximately 235 miles to San Antonio for an abortion because the McAllen clinic will be reduced from four physicians to a single doctor, unable to work fulltime, *see Cole*, 790 F.3d at 569, and will likely not be able to meet the demand that currently exists. Further, the McAllen clinic will not be permitted to see patients who live in the unincorporated areas near the border that are not part of the four counties identified by the Fifth Circuit. *Id.*

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[38] Greyhound Bus Schedule for Zapata to Laredo, GREYHOUND, http://locations.greyhound.com/bus-routes/destination/zapata-tx/laredo-tx (last visited Dec. 28, 2015).

[39] Greyhound Bus Schedule for Laredo to San Antonio, GREYHOUND, http://locations.greyhound.com/bus-routes/destination/laredo-tx/san-antonio-tx (last visited Dec. 28, 2015).

B. H.B. 2's Challenged Provisions Create a Substantial Obstacle by Significantly Delaying Abortion Appointments or Making Them Unavailable

The clinic closures resulting from the AP requirement have left few remaining abortion providers to meet the needs of women in a vast and populous state. The remaining clinics' lack of capacity has become a pervasive impediment to Latinas' ability to access abortion services.[40] In many areas, it currently takes approximately three weeks to get an appointment.[41]

For instance, in August 2015, *Ana*,[42] a 21-year old Latina, tried to obtain an abortion in Austin where she lives. She was informed she would have to wait 25

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[40] These delays are caused, in part, because abortion clinics' patient population now includes women from outside of their immediate communities.

[41] TxPep Abortion Wait Times, *supra* note 27, at 2.

[42] This brief refers to stories of Latinas who were able to obtain abortions in 2015 collected by NLIRH through in-person and phone interviews from August through October 2015. To protect confidentiality, this brief uses pseudonyms, which are italicized. While these stories do not constitute sworn testimony or record evidence, they provide a unique source of information about the lives of Latinas to help the Court access the impact of H.B. 2's challenged restrictions on their constitutional right to choose whether or not to terminate a pregnancy. The Court has accepted similar testimonials in the past. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 749 (1986); *see also Harris v. U.S.*, 536 U.S. 545, 568 (2002). The women interviewed did not receive any remuneration for sharing their stories. Interview notes are on file with NLIRH.

days for an appointment at one clinic and 26 days at a second, pushing her into her second trimester and drastically increasing the cost of the procedure. Seeing little possibility of being able to afford a second-trimester abortion, *Ana*'s only option was to travel to McAllen where she was able to get an earlier appointment. If the Fifth Circuit decision is affirmed and half of Texas' remaining abortion clinics close, women like *Ana* will face even longer wait times, and, even if the McAllen clinic is able to continue providing abortions, it will be unable to see non-Valley residents.[43] *Ana* expressed relief and gratitude that she was able to get care in McAllen. Reflecting on her experience, she said, "What if someone else needs the care, and this place is not here?"

Researchers estimate that if wait times increase to 20 days at all remaining Texas clinics the number of second-trimester abortions will nearly double.[44] Although abortion is a safe procedure throughout pregnancy, complications increase in the second trimester. (*See generally* J.A. 263-66.) Because the cost of a second-trimester abortion rises significantly, forcing women to have later abortions creates a substantial financial obstacle.

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[43] TxPEP Abortion Wait Times, *supra* note 27, at 6.

[44] *Id.*

C. H.B. 2's Challenged Provisions Create a Substantial Obstacle for Latinas with Low-Wage Jobs and School and Child-Care Commitments

Those hit hardest by H.B. 2's challenged provisions are women with low incomes who must already juggle work, school, childcare commitments and cost. *See Cole*, 790 F.3d at 589; *Lakey*, 46 F. Supp. 3d at 683. Each of these factors complicates the others, making it more difficult to have a time-sensitive procedure that becomes more expensive and invasive with time. The District Court recognized that H.B. 2's effects must be considered in the context of these real world factors, which can combine with travel distances to create a *de facto* barrier to legal abortion. *See id.* In particular, the court found that longer travel distances, "higher-than-average poverty levels, and other issues uniquely associated with minority and immigrant populations" would result in more substantial barriers "in the border communities of the Rio Grande Valley and El Paso." *Id.*

To pay for their abortions, *Griselda*, who identifies as Hispanic, and *Halley*, who identifies as Latina, both of whom are 32 year old women living in Houston, reported borrowing money from relatives and co-workers, getting cash advances from their employers, taking out "pay day" loans at 17% interest, obtaining charitable funding and pawning personal possessions. For these women, the increased cost imposed by the

strictures of H.B. 2 will be a significant impediment to abortion.[45]

International human rights bodies have expressed concern that restrictive abortion laws have an unfair and disproportionate impact on poor and rural women, like the Latinas living in the Valley.[46] Consideration of the impact that an abortion law will have on women with limited incomes is pertinent to the undue burden analysis. *See, e.g.*, *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 919 (7th Cir. 2015) (noting that a 90-mile trip could be a "big deal" for 50 percent of Wisconsin women seeking abortions with incomes below the federal poverty line); *Humble*, 753

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[45] *Amici* acknowledge that the government does not have an obligation to remove financial obstacles "not of its own creation." *Harris v. McRae*, 448 U.S. 297, 316 (1980). However, because H.B. 2's challenged provisions create new obstacles to access to abortion, they do not leave indigent Latinas "with the same range of choice" they would otherwise have and are constitutionally impermissible. *Id.*

[46] *See, e.g.*, UHRC, *Concluding Observations: Argentina*, ¶ 14, U.N. Doc. CCPR/CO/70/ARG (Nov. 15, 2000) (expressing concern over Argentine laws and policies that resulted in disproportionate numbers of poor and rural women resorting to illegal, unsafe abortions); HRC, *Concluding Observations on the Fourth Periodic Report of Ireland*, ¶ 9, U.N. Doc. CCPR/C/IRL/CO/4 (Aug. 19, 2014) (expressing concern over the discriminatory impact of restrictive abortion laws on women unable to travel abroad.) The Parliamentary Assembly of the Council of Europe has expressed concerns that restrictions on abortion access can unfairly disadvantage poor women because "women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily." European Parliament Resolution, *supra* note 36, at ¶ 2.

F.3d at 915 (considering how an abortion regulation "interacts with women's lived experience [and] socioeconomic factors").

In addition to cost, the logistics of obtaining appointments and scheduling lengthy travel can create a significant hurdle for women in low-income jobs that do not allow for flexibility in scheduling days off. When *Ana* was forced to travel from Austin to McAllen to obtain an abortion, she had to fit travel and appointments into her work schedule. *Ana* left Austin at 12:30 a.m. on Thursday night, after her restaurant shift ended, and drove 312 miles overnight. *Ana* had to return for her next shift, and had no choice but to get a surgical abortion. Her work shifts did not allow her to stay in McAllen long enough or return for the state-mandated medication administration and required follow-up. TEX. HEALTH & SAFETY CODE ANN. § 171.063 (West 2014).

Women working low-income jobs frequently face firing, demotions, or other penalties for unscheduled absences, even when required to attend to their health or their children. *Griselda*, a 32-year old, Houston Latina mother of three, was demoted from a salaried administrative position to an hourly employee because she requested time-off for a multi-day abortion procedure and placed on probation for taking off unscheduled time.

Similarly, *Ingrid*, a 22-year old Latina living in San Antonio, had a work schedule that required her to attend a necessary preliminary appointment over two days. At the time, *Ingrid* was 13 weeks pregnant. The clinic providing services to her did not perform abortions after 14 weeks, forcing her to take additional

time off to avoid having to find a new provider, imposing an economic burden on her.

If the Fifth Circuit decision is affirmed and women are forced to travel longer distances and delay procedures – making them more invasive, expensive and time consuming – Latinas working low-income jobs with little flexibility like *Ana, Griselda* and *Ingrid* will face substantial obstacles in accessing an abortion.

The majority of women who seek abortions are mothers who have decided that they cannot afford, or cannot care for, an additional child.[47] These women must balance childcare commitments, school and work. *Cecilia,* a 28-year old Latina mother of three from Hidalgo could only schedule her appointment when her children were in school and she could take two days off from her cashier job because she would have been fired otherwise. *Emiliana,* a 20-year old Latina mother from Edinberg had difficulty scheduling an appointment around academic obligations. She felt she could not disclose the reason for her absence and was reluctant to miss class because she had already missed class to care for her sick 2-year old. *Bertha,* a 25-year old Latina from Edinberg and mother of two, echoed these concerns. She missed two days of school to have an abortion. She is only allowed three absences and lack of childcare and transportation might result in further absences. Mothers like *Cecilia, Emiliana* and *Bertha* already face significant economic and educational

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[47] *Fact Sheet: Abortion in the United States*, GUTTMACHER INST., https://www.guttmacher.org/media/presskits/abortion-US/statsandfacts.html (last visited Dec. 21, 2015) ("61% [of U.S. women who have abortions] have one or more children.").

burdens in scheduling an abortion and managing their childcare; if the Fifth Circuit's decision goes into effect, it would impose substantial obstacles to their access to abortion.

Finally, as recognized by the District Court, the impact of the practical concerns women face are cumulative, and the burden imposed by H.B. 2's challenged provisions must be understood in this context. *Lakey*, 46 F Supp. 3d at 683. The longer it takes for a woman to get an appointment and make travel and other arrangements, the more complicated and expensive the abortion procedure becomes. From the moment *Halley*, a 32-year old Latina mother of three, learned she was 13 weeks pregnant until she was able to get an abortion at 19 weeks, she was "chasing the price. It goes up every week and I couldn't keep up. So my abortion was delayed."[48] *Halley* had to cancel two appointments due to her restrictive work schedule and lack of funding. By the time she was able to get an abortion, she had to travel from Houston to Dallas to locate a clinic able to provide a later procedure. The necessary travel and appointments required an unpaid week off of work.

The closure of 75% of Texas abortion clinics will force Latinas to endure significant delays in obtaining appointments, travel long distances and incur greater costs to obtain abortions. Given the circumstances of their lives, the challenged provisions will impose a

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[48] To pay for the procedure, *Halley* borrowed money from her mother and a coworker, secured a cash advance from her employer, pawned her television set and obtained a charitable contribution.

substantial obstacle in the path of Latinas seeking to terminate a pregnancy.

D. H.B. 2's Challenged Provisions Create a Substantial Obstacle for Documented and Undocumented Immigrant Women

All Texas women, including immigrants, are guaranteed Due Process rights under the Fourteenth Amendment.[49] Immigrant Latinas will be among those most affected by increased travel to obtain an abortion required by H.B. 2's challenged provisions. Women who are undocumented typically do not travel outside of their communities for fear of being stopped by the police or immigration authorities. Even individuals with legal status avoid venturing too far from home for fear of "outing" their mixed-status families.[50] Fear of immigration stops is especially great near the Mexican border, including El Paso, Houston and the Valley, where both CBP and Immigration and Customs Enforcement have increased their presence in recent years.[51] Not surprisingly, during the eleven-month

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[49] "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982).

[50] *See* Esther Yu-His Lee, *They Came to America for Freedom and Opportunity, But Ended Up Trapped in Their Own Home*, THINKPROGRESS (July 23, 2014), http://thinkprogress.org/immigration/2014/07/23/3462037/trapped-rio-grande-valley/.

[51] William C. Gruben & Tony Payan, *"Illegal" Immigration on the U.S.-Mexico Border: Is It Really a Crisis?*, JAMES A. BAKER III INST. PUB. POL'Y RICE U. 5 n. 3, 7 (2014), http://bakerinstitute.org/files/8338 (noting that between 2013 and 2014, large numbers of border

period that the McAllen clinic could not perform abortions, their staff received calls from women who were unable to go to San Antonio because they were afraid of passing immigration checkpoints.[52] The increased travel distances caused by the Fifth Circuit decision will create a substantial obstacle in accessing abortion services for these women.

E. H.B. 2's Challenged Provisions Create a Substantial Obstacle for Latinas in Abusive Relationships

Since *Casey*, the Court has recognized that women in abusive relationships are particularly vulnerable and abortion restrictions that essentially bar them from accessing legal abortions are unconstitutional. *Casey*, 505 U.S. at 893–94. In striking down a spousal notification requirement, the *Casey* Court explained: "the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." *Id.* at 894.

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agents moved into the Valley, and since 2003, Border Patrol has almost doubled its staffing on the U.S.-Mexico border).

[52] NT Report, *supra* note 12, at 23; *see also* Erik Eckholm, *A Pill Available in Mexico Is a Texas Option for Abortion*, N.Y. TIMES (July 13, 2013), *available at* http://www.nytimes.com/2013/07/14/us/in-mexican-pill-a-texas-option-for-an-abortion.html (noting difficulty faced by women who cannot cross border patrol checkpoints in accessing reproductive health services in the Valley).

Texas Latinas in abusive relationships are particularly impacted by H.B. 2's challenged provisions because of the transportation and healthcare access issues described above. Abusers frequently exercise extreme control over women's day-to-day movement and access to contraception and abortion.[53] Because domestic violence victims often have difficulty leaving their homes, the added wait times and travel distance imposed by H.B. 2's challenged provisions may make obtaining abortions practically impossible.

Bertha, a 25-year-old mother of 2 and 4-year old children, lives with her verbally and physically abusive boyfriend. *Bertha*'s boyfriend limits her access to their car. *Bertha* feared that if her boyfriend knew she was pregnant, he would accuse her of getting pregnant by someone else, physically harm her and throw her and their children out of their home. To obtain an abortion at the McAllen clinic in September 2015, *Bertha* had to make appointments at times when her eldest child was at school and when she could be back early enough that her boyfriend would not suspect anything. For women like *Bertha*, whose every move is monitored by an abusive partner, the increased travel distances and

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[53] *See* HRC, *Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rashida Manjoo*, ¶ 21, U.N. Doc. A/HRC/17/26/Add.5 (June 6, 2011) (noting that "[a]ccording to the National Domestic Violence Hotline, 25% of 3,169 callers who participated in a recent survey, reported that they had experienced birth control sabotage and pregnancy coercion"). *See generally* Linda Chamberlain & Rebecca Levenson, *Addressing Intimate Partner Violence, Reproductive and Sexual Coercion*, FUTURES WITHOUT VIOLENCE (2012), http://www.futureswithoutviolence.org/userfiles/file/HealthCare/reproguidelines_low_res_FINAL.pdf.

time required by the Fifth Circuit's decision would make access to abortion virtually impossible.

The limited capacity at the McAllen clinic contemplated by the Fifth Circuit decision could prevent *Bertha* and other women in the Valley from obtaining timely appointments in McAllen. *Bertha* stated that it would be "very difficult, if not impossible" for her to travel to San Antonio for an abortion because her boyfriend would not have permitted her to make the required overnight trip. She added if she had been unable to get an appointment in McAllen, "I would be forced to have another child, and financially, I can't do that."

III. INTERNATIONAL HUMAN RIGHTS BODIES RECOGNIZE THAT WHEN WOMEN DO NOT HAVE ACCESS TO SAFE AND LEGAL ABORTIONS, THEIR LIVES AND HEALTH MAY BE AT RISK

Globally, unsafe abortions accounted for 47,000 deaths in 2008, close to 13% of all maternal deaths.[54] H.B. 2's challenged provisions not only deprive Latinas of access to legal abortions; it also may put their health and lives at risk. Around the world, where women are denied access to legal abortions, the rate of

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[54] WORLD HEALTH ORGANIZATION, UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2008 1 (6th ed. 2011) (hereinafter "WHO UNSAFE ABORTION").

unsupervised and unsafe abortions rises.[55] Studies have shown that in other countries "[r]estrictive laws have much less impact on stopping women from ending an unwanted pregnancy than on forcing those who are determined to do so to seek out clandestine means."[56]

International human rights bodies and experts have repeatedly criticized restrictive abortion laws because they "consistently generate poor physical health outcomes, resulting in deaths that could have been prevented ... [and] negative mental health outcomes."[57] The U.N. Human Rights Committee has explicitly expressed concern that the "unavailability of abortion in practice even when the law permits it" may lead to "unsafe, illegal abortions, with attendant risks to [ ] life and health."[58]

U.S. courts considering the constitutionality of restrictive abortion laws have also recognized that lack of access to legal abortion care creates a risk of illegal abortions that can endanger women's lives and health. *See Planned Parenthood Se., Inc. v. Strange,* 33 F.

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[55] *See* Susan A. Cohen, *Facts and Consequences: Legality, Incidence and Safety of Abortion Worldwide*, 12 GUTTMACHER POL'Y REV. 3 (2009).

[56] *Id.*

[57] U.N. General Assembly, *Interim Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 22, U.N. Doc A/66/254 (Aug. 3, 2011).

[58] HRC, *Consideration of Reports Submitted By State Parties under Article 40 of the Covenant: Poland*, ¶ 8, U.N. Doc. CCPR/CO/82/POL (Dec. 2, 2004).

Supp. 3d 1330, 1362 (M.D. Ala.), *as corrected* (Oct. 24, 2014), *supplemented*, 33 F. Supp. 3d 1381 (M.D. Ala. 2014) *and amended*, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014); *Planned Parenthood of Wisconsin, Inc. v. Van Hollen*, 94 F Supp. 3d 949, 994 (W.D. Wis. 2015), *aff'd sub nom. Planned Parenthood of Wisconsin, Inc. v. Schimel*, No. 15-1736, 2015 WL 7424017 (7th Cir. Nov. 23, 2015) (same).

If the Fifth Circuit decision goes into effect, it will leave more women with the untenable choice of seeking an illegal abortion, carrying an unintended pregnancy to term, or attempting to self-induce an abortion. Research indicates that barriers to obtaining abortions in clinics are a major reason why Texas women attempt self-induction.[59] In a recent survey, a team of university researchers found that 1.7-4.1% of Texas women aged 18-49 reported attempting self-induction, leading those researchers to estimate that between 100,000 and 240,000 Texas women of childbearing age had attempted self-induction.[60] Women interviewed who tried to self-induce stated that they would have preferred a clinic abortion but "felt that it was out of reach financially and logistically" – they cited costs, travel, and clinic closures among the primary reasons for their actions.[61] If clinic-based care becomes more

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[59] *See generally* Daniel Grossman et al., *Self-Induction of Abortion among Women in the United States*, 18 REPRODUCTIVE HEALTH MATTERS 136, 136–37 (2010).

[60] TxPep Self-Induction Report, *supra* note 30, at 2–4.

[61] TEXAS POLICY EVALUATION PROJECT, TEXAS WOMEN'S EXPERIENCES ATTEMPTING SELF-INDUCED ABORTION IN THE FACE

difficult to access, the researchers concluded that self-induction is likely to increase, and Latinas living near the border and poor women who face barriers in accessing reproductive healthcare are most likely to be affected.[62]

A common method women use to try to induce abortion is misoprostol.[63] Like any medication obtained through back channels or used without medical supervision, misoprostol can be counterfeit or used incorrectly, posing health dangers. (J.A. 369, 252.)[64] Other self-induction practices can be unsafe and ineffective.[65] Latinas in the Valley have said if abortion

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OF DWINDLING OPTIONS 2, 5 (2015), *available at* https://utexas.app.box.com/WExSelfInductionResearchBrief at 2, 5 (hereinafter "TxPEP QUALITATIVE STUDY").

[62] TxPep Self-Induction Report, *supra* note 30, at 4; TxPEP QUALITATIVE STUDY, *supra* note 61, at 5. Latinas living near the border are most likely to be affected because misoprostol is available without a prescription in Mexico and "is widely trafficked in the Rio Grande Valley." (J.A. 369.)

[63] TxPep Self-Induction Report, *supra* note 30, at 4.

[64] When unsupervised by a medical professional, women reported obtaining misoprostol in Mexico, where it is sold without a prescription, TxPEP QUALITATIVE STUDY, *supra* note 61, at 2–3, or purchased over the Internet. *See McCormack v. Hiedman*, 694 F.3d 1004 (9th Cir. 2012).

[65] Practices mentioned by Texas women include use of herbs or hormonal pills, which are not effective, and dangerous methods such as getting punched in the abdomen. TxPep Self-Induction Report, *supra* note 30 at 4. The WHO has documented other self-

were unavailable at the McAllen clinic, they would go to Mexico, where abortion is more available despite its illegality in the country's border states.[66] *Emiliana* stated, "I'd go to Mexico if I had to. I know that some people end up going to Mexico." However, they expressed concern about the safety of traveling to Mexico and the standard of medical care. *Cecilia* admitted not knowing much about abortion care in Mexico and did not trust the doctors there. Fears about abortion in Mexico are well-founded; studies show that in Mexico, where abortion remains largely illegal, abortions are frequently conducted under unsafe conditions, resulting in high complication and hospitalization rates.[67]

The likelihood that many women will attempt dangerous self-induction methods if the Fifth Circuit's decision is affirmed is supported by empirical evidence. When women could not obtain a legal abortion in the Valley, the McAllen clinic encountered a significant increase in women seeking medical assistance after attempting self-abortion. (J.A. 721-22; *see also* J.A. 369-70 (reporting increased self-abortion attempts after

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induction methods, including insertion of an object into the uterus and violent abdominal massage. WHO UNSAFE ABORTION, *supra* note 54, at 2.

[66] J.A.247-48 (noting that abortion is legally restricted in Mexico everywhere except Mexico City, and that neighboring states Louisiana and Oklahoma recently enacted admitting privileges requirements).

[67] *See* Fatima Juarez et al, *Estimates of Induced Abortion in Mexico: What's Changed between 1990 and 2006?*, 34 INT'L FAM. PLANNING PERSPECTIVES 158 (2008).

clinics in Valley closed).) One woman who called the McAllen clinic during that time period said "If you can't see me [for an appointment] then I can tell you what is underneath my kitchen and bathroom sinks, and you can tell me what I can take to abort."[68]

CONCLUSION

For over 40 years, this Court has acknowledged that the Constitution places limits on a State's right to interfere with the most basic decisions about family and parenthood. *Casey*, 505 U.S. at 849. H.B. 2's challenged provisions exceed those limits. For the foregoing reasons, the judgment of the Fifth Circuit Court of Appeals should be reversed.

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[68] NUESTRO TEXAS, TRANSCRIPTS OF THE HUMAN RIGHTS HEARING TESTIMONY 23 (2015), *available at* http://www.nuestrotexas.org/wp-content/uploads/2015/09/NT_Hearing_RGV_Final_Transcripts_Web.pdf.

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